IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT E. WRIGHT, SR.	:	CIVIL ACTION
	:	
v.	:	
	:	
MONTGOMERY COUNTY, et al.	:	NO. 96-CV-4597

MEMORANDUM AND ORDER

HUTTON, J. December 18, 1998

Presently before the Court are Defendants' Montgomery County, Montgomery County Commissioners, Mario Mele, Commissioner of Montgomery County, Richard S. Buckman, Commissioner of Montgomery County and Joseph M. Hoeffel, III, Commissioner of Montgomery County (the "Montgomery County Defendants") Motion for Summary Judgment Concerning their Immunity (Docket No. 39), the Montgomery County Defendants' unopposed Motion for Summary Judgment Concerning Plaintiff's State Law Tort Claims (Docket No. 40), the Montgomery County Defendants' Motion for Summary Judgment on all claims (Docket No. 41), Plaintiff's Reply Memorandum in Opposition to Defendants' Motion for Summary Judgment (Docket No. 46), the Montgomery County Defendants' Reply Brief in Support of their Motions for Summary Judgment On All Claims (Docket No. 67) and Certification Pursuant to Local Rule 7.1(c) of Uncontested Motion for Summary Judgment Concerning Counts Two Through Eight of the Complaint (Docket No. 73), and Defendants' uncontested Motion to

Vacate this Court's Order dated October 30, 1998, quashing subpoenas served upon Maillie Falconiero and Company, LLP and George Falconiero by the Defendants and granting Joseph J. Pizonka's and Barbara Pizonka's Motion for a Protective Order (Docket No. 68), and Defendants' uncontested Motion to Strike Plaintiff's Belated and Prejudicial Answers to Defendants' Counterclaims and for the Entry of Judgment (Docket No. 66) and Defendants' Certification Pursuant to Local Rule 7.1(c) of Uncontested Motion (Docket No. 69) Also before the Court is the Motion of non-parties Joseph J. Pizonka and Barbara Pizonka, his wife, to Modify and/or Quash Subpoenas Directed to Maillie Falconiero and Company, LLP and George Falconiero, and/or for a Protective Order (Docket No. 42) and the Defendants' response thereto (Docket No. 49).

I. BACKGROUND

Taken in the light most favorable to the nonmoving party, the facts are as follows. On June 25, 1996, Plaintiff Robert E. Wright, Sr. ("Wright" or "Plaintiff") brought this employment discrimination action against Defendants Montgomery County, Richard S. Buckman, Commissioner of Montgomery County and Joseph M. Hoeffel, III, Commissioner of Montgomery County ("Montgomery County Defendants" or "Defendants"). In his complaint, Wright alleges, in substance, that the Defendants terminated his employment as

Director at the Montgomery County Department of Housing Services ("MDHS") because he is an African-American, and seeks damages.

Wright was employed by Montgomery County for approximately seventeen (17) years in the Department of Housing Services. He was promoted to the Director of the Department of Housing Services of Montgomery County on July 1, 1994.

On April 12, 1996, following an investigation by the Housing of Urban Development ("HUD"), Wright was suspended from his position as Director. Wright alleges that he was officially terminated from the position on June 13, 1996. Wright alleges that the reason for his termination was because he is an African-American. He also alleges that he has suffered damages as a result of his firing.

Consequently, in June 1996, Plaintiff brought suit claiming that the Defendants discharged him because of his race in violation of Title VII of the Civil Rights Act (Count One). Plaintiff also alleges a litany of state law tort claims: defamation (Count Two); infliction of emotional distress (Counts Three, Four and Seven); breach of contract/wrongful discharge (Count Six); fraudulent or negligent misrepresentation (Counts Three and Five); tortious interference with contract (Count Three); abuse of process or malicious prosecution (Count Three); false swearing to authorities, obstruction of justice and official oppression (Count Three); and invasion of privacy (Counts Three and

Eight). On February 25, 1997, Defendants filed Counterclaims against Plaintiff Wright for Breach of Fiduciary Duties, Negligence and Fraud.

On September 28, 1998, the Defendants filed three summary judgment motions. In their Motions, Defendants request that judgment be entered in their favor on all claims, including Plaintiff's claims and Defendants' Counterclaims. As of the date of this Order, Plaintiff has not filed a response to Defendants' September 28, 1998, Motion for Summary Judgment concerning all of Plaintiff's state law tort claims pleaded in Counts Two through Eight. On November 6, 1998, the Plaintiff filed untimely Answers to Defendants' Counterclaims. On October 13, 1998, Plaintiff filed a response to Plaintiff's Motion for Summary Judgment concerning Plaintiff's constitutional claim. Subsequently, Defendants filed a series of replies and motions regarding Defendants' summary judgment motions and the issues now considered by the Court. Because the instant matter is ripe for adjudication, this Court considers Defendants' Motions for Summary Judgment.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The

party moving for summary judgment has the initial burden of showing the basis for its motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the non-movant. Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. Id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

III. DISCUSSION

A. Plaintiff's Title VII Claim

To prove a Title VII claim of employment discrimination:

(1) the plaintiff must establish by a preponderance of the evidence a prima facie case of the discrimination alleged; (2) if successful in making such a showing, the burden shifts to the defendant to articulate some legitimate, non-discriminatory reason for the plaintiff's discharge; and (3) once the defendant articulates such a reason, the burden shifts to the plaintiff to show that the reasons proffered by the defendant were a mere pretext. Texas Dep't Of Community Affairs v. Burdine, 450 U.S. 248, 250-52 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-804 (1973); see also Jalil v. Avdel Corp., 873 F.2d 701, 706 (3d Cir. 1989), cert. denied, 110 S. Ct. 725 (1990); Brian v. The Greif Companies, 1990 WL 204227 at *5 (E.D. Pa. Dec. 7, 1990). "[T]hese shifting burdens are meant only to aid the courts and the litigants in arranging the presentation of evidence. 'The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777, 2784 (1988) (citations omitted).

"A prima facie case 'raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.'" Bennett v. Veterans Administration Medical Center, 721 F. Supp. 723, 729 (E.D. Pa. 1988) (quoting Texas Dep't Community Affairs v. Burdine, 450 U.S. at 254). To

establish a prima facie case of race discrimination, Wright is required to show the following: (1) he was a member of a protected class; (2) he was employed at MDHS as the Director and he was qualified for the position; (3) he was discharged from that position; and (4) his co-workers, who are white, were not discharged. Jackson v. University of Pittsburgh, 826 F.2d 230, 233 (3d Cir.1987), cert. denied, 484 U.S. 1020 (1988).

In Count One of his Complaint, the Plaintiff alleges that he was terminated from employment from the Montgomery County Department of Housing Services ("MDHS") because of racial discrimination. Defendants dispute that Wright's termination was racially motivated. They contend that Montgomery County terminated Wright because an audit by the United States Department of Housing and Urban Development, Office of Inspector General ("HUD Audit") revealed that Plaintiff Wright, and two other Caucasian employees, Thomas Raimondi and Philip Montefiore, all engaged in conflicts of interest by using these same HUD contractors to perform work on their own private properties. Defendants argue that Plaintiff fails to satisfy his burden to show that the reasons proffered by the Defendant were a mere pretext. The disputed causal connection and the credibility of the proffered explanation are, of course, issues that a jury must resolve. Wright has produced sufficient evidence for a reasonable jury to infer that race was a determinative factor in Plaintiff's termination. The fact that

other male Caucasians were also terminated as a result of the HUD audit is not dispositive. It is unrefuted that the Plaintiff was the only Black employee of Defendant Montgomery County to become a department head. Furthermore, the Plaintiff alleges that other Department Heads have been accused of similar wrongdoings and have received lesser punishment.

B. Plaintiff's State Law Tort Claims

Defendants argue that they are entitled pursuant to Local Rule 7.1(c) to summary judgment on Plaintiff's state law tort claims because Plaintiff failed to respond to Defendants' Motion for Summary Judgment. Local Rule 7.1(c) provides that except for summary judgment motions, "any party opposing the motion shall serve a brief in opposition, together with such answer or other response which may be appropriate, within fourteen (14) days after service of the motion and supporting brief." E.D. Pa. R. Civ. P. 7.1(c). Accordingly, this Court may not dismiss Plaintiff's state law claims on summary judgment pursuant to Local Rule 7.1(c).

Nonetheless, a court may grant an unopposed motion for summary judgment where it is "appropriate." Fed. R. Civ. P. 56(e). This determination has been described as follows:

> Where the moving party has the burden of proof on the relevant issues, . . . the district court must determine that the facts specified in or in connection with the motion entitle the moving party to judgment as a matter of law. Where the moving party does not have the burden of proof on the relevant issues, . . .

> the district court must determine that the deficiencies in the opponent's evidence designated in or in connection with the motion entitle the moving party to judgment as a matter of law.

Anchorage Assocs. v. Virgin Islands Bd. of Tax Review, 922 F.2d 168, 175 (3d Cir. 1990).

In the instant matter, Plaintiff failed to respond to Defendants' Motion for Summary Judgment concerning all of Plaintiff's State Law Tort Claims pleaded in Counts Two through Eight of the Complaint. The Plaintiff, however, responded to Defendants' Motion for Summary Judgment regarding his constitutional claim. By choosing to defend his constitutional claim, and not his state law claims, it is apparent that the Plaintiff has elected to abandon his state law tort claims. See LeBaud v. Frische, 156 F.3d 1243, 1998 WL 537504, at *3 (10th Cir. Aug. 20, 1998) (finding that plaintiff who made a claim in his Complaint, yet failed to mention that claim in his Answer to Defendants' Motion for Summary Judgment had abandoned that claim); Haroco, Inc. v. American National Bank and Trust Company of Chicago, 747 F.2d 384, 402 n.21 (6th Cir. 1984) (same). See also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) ("Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear

the burden of proof...."). Thus, it is appropriate to grant the Defendants' uncontested motion for summary judgment regarding Plaintiff's state law claims. See Anchorage Assocs., 922 F.2d at 175.

C. Defendants' Counterclaims

On February 25, 1997, Defendants filed Counterclaims against Plaintiff Robert Wright for Breach of Fiduciary Duties, Negligence and Fraud. On November 6, 1998, the Plaintiff filed untimely Answers to Defendants' Counterclaims. The Defendants argue that its Counterclaims should be granted as unopposed for Plaintiff's failure to file a timely response pursuant to Local Rule 7.1(c). Defendants Counterclaims are, in essence, proffered non-discriminatory reasons for Plaintiff's termination. A finding in favor of the Defendants on this issue at this stage would be tantamount to dismissing Plaintiff's claim without addressing the merits.[1] Thus, this Court will address the merits of the underlying arguments. See In re Orthopedic Bone Screw Products Liability Litigation, MDL No.1014, 1997 WL 109595, at * 1 (E.D. Pa. Mar. 7, 1997) ("in a summary judgment motion the court is ruling on the merits of a case rather than on the adequacy of the pleadings"); see also Can v. Golsorkhi, No.CIV.A. 95-CV-1657, 1995

[1]Wright alleges that his termination was based upon racial discrimination. The Defendants assert that Wright was fired because he breached his fiduciary duties as Director of MDHS, he performed his duties as Director negligently and committed fraud in his official capacity as Director.

WL 621599, at *5 (E.D. Pa. Oct. 23, 1995) (reaching the merits of the motion for summary judgment even though Plaintiff's response was untimely).

In the instant matter, Defendants offer no evidence for which this Court can find that Wright breached his fiduciary duties, performed his job negligently, or committed fraud. See, e.g., Rippee v. Grand Valley Manufacturing Co., 762 F.2d 25, 27 (3d Cir. 1985) (requiring a preponderance of the evidence to establish negligence); Mid-Atlantic Perfusion Assoc., Inc. v. Professional Ass'n Consulting Servs., Inc., No.Civ.A.93-3027, 1994 WL 418990, at *6 (E.D. Pa. Aug. 9, 1994) (noting that a preponderance of the evidence is required to prove breach of fiduciary duty). Moreover, Pennsylvania law requires the plaintiff alleging fraud to prove the following elements by clear and convincing evidence: "(1) a misrepresentation; (2) a fraudulent utterance of it; (3) the maker's intent that the recipient be induced thereby to act; (4) the recipient's justifiable reliance on the misrepresentation; and (5) damage to the recipient proximately caused." Trans Penn Wax Corp. v. McCandless, 50 F.3d 217, 231 (3d Cir. 1995) (citing Seven v. Kelshaw, 417 Pa. Super. 1, 611 A.2d 1232, 1236 (1992)). As such, this Court can not find as a matter of law that Wright breached his fiduciary duty as Director of MDHS, performed his job negligently and committed fraud while in that position.

D. Defendants' Uncontested Motion to Vacate this Court's

Order Dated October 30, 1998, Quashing Subpoenas or Protected Order

On October 30, 1998, this Court granted as unopposed the motion of non-parties Joseph J. Pizonka and Barbara Pizonka, his wife, to quash subpoenas directed to Maillie Falconiero and Company, LLP and George Falconiero. As of the date of that Order, the Court was unaware of any response by the Defendants. The Defendants, however, had filed a timely response on October 22, 1998. Moreover, the Plaintiffs and/or the moving third parties have failed to respond to the instant motion. As of the date of this Order, no response has yet been filed by either the Plaintiffs and/or the moving third parties. Local Rule 7.1(c) of the Civil Procedure of the United States District Court for the Eastern District of Pennsylvania provides that "[i]n the absence of a timely response, the motion may be granted as uncontested . . . ." E.D. Pa. R. Civ. P. 7.1(c). Accordingly, this Court grants the Defendants' motion to Vacate its earlier Order pursuant to Local Rule 7.1(c), id., and will now consider the non-parties Motion to Modify and/or Quash Subpoenas.

On October 5, 1998, counsel for Mr. and Mrs. Pizonka (the "Pizonkas") filed the instant motion requesting that this Court quash subpoenas served upon Maillie Falconiero and Company, LLP and George Falconiero by the Defendants. The Defendants initially served subpoenas on said parties on September 24, 1998. The subpoenas describe various documents that said parties are required

to produce. (See Subpoena; Schedule A.) The Pizonkas object to the production of such information arguing that its production is overly broad and unduly burdensome.

Rule 26(b)(1) of the Federal Rules of Civil Procedure provides that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ." Fed. R. Civ. P. 26(b)(1). Rule 45(c)(3)(A) of the Federal Rules of Civil Procedure requires a court to quash or modify a subpoena that subject a person to "undue burden." Fed. R. Civ. P. 45(c)(3)(A)(iv). Moreover, "Rule 26(c) authorizes a court to issue a protective order where justice so requires and upon good cause shown. The party seeking a protective order bears the burden of demonstrating 'good cause' required to support such an order." Trans Pacific Ins. Co. v. Trans-Pacific Ins. Co., 136 F.R.D. 385, 391 (E.D. Pa. 1991).

Given the Plaintiffs' claims and Defendants' Counterclaims, the documents requested in the subpoena are clearly relevant to the instant case.[2] Accordingly, the question is whether the subpoena subjects the non-parties to an "undue burden."

[2]Plaintiff led the MDHS while Mr. Pizonka served as Solicitor for the Borough of Norristown. Defendants allege that they rightfully terminated Wright based on findings of wrongful and illegal conduct revealed in the HUD Audit. Defendants allege that Wright, Pizonka, Pizonka's law firm (Pizonka, Reilley & Bello) and Northowne Realty ("Partnership") are at the heart of Wright's misconduct. Defendants allege that Wright and Pizonka hide their 50/50 deals by using Northowne's accountant, George Falconiero, report Northowne's transactions on Mr. and Mrs. Pizonka's tax returns. Accordingly, the requested information including the Pizonka's tax returns are clearly relevant to the instant case.

Cf. Torres v. Kuzniasz, 936 F. Supp. 1201, 1207 (D.N.J. 1996).

Here, the Pizonkas fail to show "good cause" or that the subpoenas subject the named parties in the subpoena to an "undue burden." Moreover, the Pizonkas' Motion to Quash Subpoenas is defective. Local Rule 7.1(c) states that "[every motion not certified as uncontested, or not governed by Local Civil Rule 26.1(g), shall be accompanied by a brief containing a concise statement of the legal contentions and authorities relied upon in support of the motion." E.D. Pa. R. Civ. P. 7.1(c). Pizonkas' Motion is not accompanied by a brief.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
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ROBERT E. WRIGHT, SR.	:	CIVIL ACTION
	:	
v.	:	
	:	
MONTGOMERY COUNTY, et al.	:	NO. 96-CV-4597

O R D E R

AND NOW, this 18th day of December, 1998, upon consideration of Defendants' Montgomery County, Montgomery County Commissioners, Mario Mele, Commissioner of Montgomery County, Richard S. Buckman, Commissioner of Montgomery County and Joseph M. Hoeffel, III, Commissioner of Montgomery County (the "Montgomery County Defendants") Motion for Summary Judgment Concerning their Immunity (Docket No. 39), the Montgomery County Defendants' unopposed Motion for Summary Judgment Concerning Plaintiff's State Law Tort Claims (Docket No. 40), the Montgomery County Defendants' Motion for Summary Judgment on all claims (Docket No. 41), Plaintiff's Reply Memorandum in Opposition to Defendants' Motion for Summary Judgment (Docket No. 46), the Montgomery County Defendants' Reply Brief in Support of their Motions for Summary Judgment On All Claims (Docket No. 67) and Certification Pursuant to Local Rule 7.1(c) of Uncontested Motion for Summary Judgment Concerning Counts Two Through Eight of the Complaint (Docket No. 73), and Defendants' uncontested Motion to Vacate this Court's

Order dated October 30, 1998, quashing subpoenas served upon Maillie Falconiero and Company, LLP and George Falconiero by the Defendants and granting Joseph J. Pizonka's and Barbara Pizonka's Motion for a Protective Order (Docket No. 68), and Defendants' uncontested Motion to Strike Plaintiff's Belated and Prejudicial Answers to Defendants' Counterclaims and for the Entry of Judgment (Docket No. 66) and Defendants' Certification Pursuant to Local Rule 7.1(c) of Uncontested Motion (Docket No. 69), and Motion of non-parties Joseph J. Pizonka and Barbara Pizonka, his wife, to Modify and/or Quash Subpoenas Directed to Maillie Falconiero and Company, LLP and George Falconiero, and/or for a Protective Order (Docket No. 42) and the Defendants' response thereto (Docket No. 49) IT IS HEREBY ORDERED THAT:

(1) Count One of the Plaintiff's Complaint is **NOT DISMISSED**;

(2) Counts Two through Eight of the Plaintiff's Complaint are **DISMISSED**;

(3) Defendants' Motion for Judgment on Counterclaims is **DENIED**;

(4) Defendants' Motion to Strike Plaintiff's Belated and Prejudicial Answers to Defendant' Counterclaims is **DENIED as moot**;[3]

(5) Defendants' uncontested Motion to Vacate this Court's

[3]Because the issues raised by Defendants' in the instant motion have already been addressed by the Court, see supra Part III.C and note 3, this Motion is denied as moot.

Order dated October 30, 1998, quashing subpoenas served upon Maillie Falconiero and Company, LLP and George Falconiero by the Defendants and granting Joseph J. Pizonka's and Barbara Pizonka's Motion for a Protective Order is **GRANTED**; and

(6) Motion of non-parties Joseph J. Pizonka and Barbara Pizonka, his wife, to Modify and/or Quash Subpoenas Directed to Maillie Falconiero and Company, LLP and George Falconiero, and/or for a Protective Order is **DENIED**.

IT IS FURTHER ORDERED THAT:

(1) this Court's Order dated October 30, 1998 quashing subpoenas served upon Maillie Falconiero and Company, LLP and George Falconiero by the Defendants and granting Joseph J. Pizonka's and Barbara Pizonka's Motion for a Protective Order is **VACATED**; and

(2) this case shall be placed in the trial pool on ___ March 3, 1999 .

BY THE COURT:

_____
HERBERT J. HUTTON, J.